Supreme Court, U.S.
FILED
SEP 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1954

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR., RICARDO TREVINO, JR.,

Petitioners

V.

T. L. HARVILLE, LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY, W. M. LAUGHLIN, ARNOLDO GONZALEZ, CHARLES HARLESS, ZARAGOSA GARCIA, JR., J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

Petitioners are submitting this Supplemental Brief pursuant to United States Supreme Court Rule 22.6 to call to the attention of this Court a new decision which was not available when the Petition for Certiorari was filed on May 28, 1986. The new decision is Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, ___ U.S. ___, 106 S.Ct. 3088 (1986) (hereinafter cited as Delaware Valley) which was announced by this Court on July 2, 1986.

1. Status of Proceedings

The instant Petition for Certiorari involves a successful enforcement pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, in Jim Wells County, Texas. The petitioners successfully prevented respondents from

continuing to implement a discriminatory redistricting plan for the County's Commissioners' Precincts. In conjunction with the legal action petitioners actively participated in ancillary preclearance proceedings before the United States Attorney General. As a result of these activities, Petitioners secured their litigation objectives of enactment of a non-discriminatory re-districting plan for the Commissioners' Precincts. Petitioners seek the recovery of attorneys' fees for their work in this ancillary administrative proceeding. Although the District Court (Pet. App. at 38a) denied such an award, and the Court of Appeals for the Fifth Circuit (Pet. App. at 1a) affirmed that denial, this Court's decision in Delaware Valley clearly demonstrates that these lower court decisions were in error.

2. Summary of New Case

Delaware Valley involved an action filed by the Delaware Valley Citizens' Council for Clean Air to require the Commonwealth of Pennsylvania to comply with the vehicle emission inspection and maintenance program as mandated by the Clean Air Act. 42 U.S.C. §7410. Subsequently, the parties entered into a consent decree. The consent decree required the Pennsylvania Department of Transportation to seek legislation which would meet the requirement of the Clean Air Act. Absent such legislation, the Department of Transportation was required to promulgate regulations which would meet the terms of the decree.

The Department of Transportation was not successful in securing the necessary legislation. Subsequently, the

Department published proposed regulations. Delaware Valley submitted comments on the regulations. Delaware Valley also participated in hearings before the Environmental Protection Agency where the Commonwealth unsuccessfully sought to limit the geographical scope of the inspection and maintenance program required by the consent decree.

Although Delaware Valley's administrative advocacy services were rendered after the litigation had terminated with a final decree and were not conducted within the confines of the courtroom, the District Court awarded fees for this administrative work pursuant to the attorneys' fees provision of the Clean Air Act, 42 U.S.C. §7604 (d). Delaware Valley Citizens v. Pennsylvania, 581 F.Supp. 1412 (E.D.Pa. 1984). The Court of Appeals for the Third Circuit affirmed

the award of fees for this administrative advocacy. Delaware Valley Citizens v. Pennsylvania, 762 F.2d 272, 277 (3rd Cir. 1985).

This Court affirmed the award of attorneys' fees for services rendered during these ancillary administrative proceedings. The Court rejected the argument that the plain language of the attorneys' fees provision, which specifically refers to court proceedings and litigation costs, precluded recovery of a fee award for such work. ___ U.S. at ___, 106 S.Ct. at 3094. In rejecting these arguments, the Court noted that the administrative work " was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." ___ U.S.

at ___, 106 S.Ct. at 3094. Moreover, the absence of a traditional judicial proceeding was not dispositive: "[A]nd enforcement of the decree, whether in the courtroom before a judge, or in front of a regulatory agency with power to modify the substance of the program ordered by the court, involved the type of work which is properly compensable as a cost of litigation ...". ___ U.S ___ at _____, 106 S.Ct. at 3095. [1]

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[1] In addition, the termination of the litigation also did not preclude the award for attorney's fees for services rendered in ancillary administrative proceedings. The Court specifically referred to the precedent established pursuant to the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. §1988, permitting the award of attorney's fees for the post-judgment monitoring of a consent decree. ___ U.S. at ___, 106 S.Ct. at 3095.

The Court also referred to the explicit congressional policy supporting the attorney's fees statutes which sought to "insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Laws." ___ U.S. at ___, 106 S.Ct. at 3095. This Congressional policy also recognized the importance of private parties to the effective enforcement of these Civil Rights statutes and the necessity of attorneys' fees awards to permit such private enforcement:

> 'The effective enforcement of Federal Civil rights statutes depends largely on the efforts of private citizens,' and unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed.

___U.S. at ___, 106 S.Ct. at 3095. (citations omitted)

The key concern in Delaware Valley was permitting constituents of Delaware Valley to have a meaningful opportunity to vindicate their rights protected by the Clean Air Act. Vindicating these rights in Delaware Valley required the rendition of advocacy services in ancillary administrative proceedings which were related to the litigation. Without such administrative participation, constituents of Delaware Valley would not have been able to protect their rights, for the consent decree did not finally secure those rights, but merely initiated a process by which those rights could be attained. Awarding attorney's fees for such work permits plaintiffs such as Delaware Valley to secure competent counsel who can represent their interests in such critical administrative proceedings where, quite often, decisions are

made which determine whether such plaintiffs' litigation victory is Pyrrhic or final.

This Court has previously held that as long as the work performed is useful and of the type ordinarily necessary to secure the final relief desired from the litigation, such work before optional administrative proceedings is compensable. Webb v. Board of Education of Dyer County, ___ U.S. ___, 105 S.Ct. 1923 (1985). In recognition of the holding in Webb, the Court concluded in Delaware Valley, "We agree that participation in these administrative proceedings was crucial to the vindication of Delaware Valley's rights under the consent decree and find that compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court." ___ U.S. at,

106 S.Ct. at 3096.

APPLICATION OF NEW CASE TO ARRIOLA

The lower court decisions in the instant case are inconsistent with this Court's ruling in Delaware Valley. The principle established in Delaware Valley authorizes the award of attorney's fees for services rendered in an ancillary administrative proceeding related to an enforcement action under Section 5 of the Voting Rights Act, especially where such services were both useful and of a type ordinarily necessary to secure the final objective of the litigation.

There are many similarities between Delaware Valley and Arriola. In both cases, plaintiffs sought to vindicate their rights protected by a federal statute: the Clean Air Act in Delaware Valley and the Voting Rights Act in

Arriola. In both cases, plaintiffs' preliminary victory in a court action set the stage for administrative proceedings, which would ultimately determine whether plaintiffs attained their remedial goals. In both cases, had plaintiffs not participated in the administrative proceedings, or been unable to marshal the resources to participate effectively and successfully, plaintiffs' litigation victory would have remained a hollow one, without remedial effect.

In at least one respect Arriola differs from Delaware Valley in a way that makes Arriola a more compelling case for an award of attorneys' fees. In Delaware Valley, the litigation had t-erminated when the consent decree was entered. In contrast, in Arriola the ongoing litigation did not terminate with the issuance of an injunction which

merely enjoined the continued implementation of an existing discriminatory redistricting plan, but did not enjoin respondents to adopt a new plan or to remedy their past discrimination. As a result of the injunction, before a new redistricting plan could be implemented, the County was required by Section 5 to submit any proposed plan for preclearance. During this preclearance process, the District Court retained jurisdiction and held the case in abeyance until a new plan received the requisite approval. Thus, in Arriola the nexus between the court proceedings and the administrative proceedings was even closer than in Delaware Valley.

The basic effect of both a consent decree, such as finally terminated Delaware Valley, and a permanent injunction which retains jurisdiction, as

in Arriola, is that they neither require nor support any difference in result. Consent decrees, court orders, voluntary cessation of the discriminatory activity by defendants, and participation before ancillary administrative proceedings are alternative mechanisms by which plaintiffs may accomplish the ultimate objective of their lawsuit. The key issue is whether plaintiffs' participation in these mechanisms resulted in securing the relief they sought. As the two cases illustrate, participation in administrative proceedings can play a critical role in securing the ultimate objective of the litigation irrespective of whether the parties entered into a consent decree. For attorney's fees purposes, it is the result -- not the nature of the proceedings in which relief was obtained, or the timing of the court order -- which

justifies the fee award. [2]

The Court also noted in Delaware Valley that the administrative proceeding need not "involve 'traditional' legal work such as examination of witnesses or selection of jurors for trial" in order to be compensable. ___ U.S. at ___, 106 S.Ct. at 3094. Indeed, the Court affirmed the award of attorney's fees for work performed in submitting comments to regulations proposed by the Department of Transportation. As the District Court noted, this award was proper, even though anyone could have submitted comments on

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[2] Arriola is not a case where Petitioners seek an award of attorney's fees for services rendered in federal administrative proceedings "...when there is no connected court action in which fees are recoverable." Delaware Valley, ___U.S. at ___, n. 5, ___ S.Ct. at 3096, n. 5.

the regulations. Delaware Valley Citizens v. Pennsylvania, 351 F.Supp. 1412, 1423 (E.D. Pa. 1984) ("While it is true that the opportunity to submit comments to the proposed regulations was available to any person, it does not follow, as defendants contend, that plaintiffs should not be compensated for the time used in preparing comments.").

In Arriola, the participation in the ancillary administrative proceeding went beyond the forwarding of comments seeking a change in proposed regulations. Petitioners engaged in extensive administrative advocacy as well as negotiations with County officials during the remedial phase of this lawsuit. The administrative advocacy consisted of extensive comments urging the disapproval of the submitted redistricting plans. In addition, there were telephone

conferences with staff from the Attorney General's office. These telephone conferences provided additional information to assist the Attorney General in evaluating the submitted redistricting plans. Most importantly, this administrative advocacy was successful. See Petition for Writ of Certiorari, at 10-17.

Underlying both the Voting Rights Act's fees provision and that of the Clean Air Act is an explicit congressional policy designed to enable private parties to have a meaningful opportunity to protect their rights as provided by federal law. See, e.g., Petition for Writ of Certiorari, at 24-31; and Delaware Valley, ___ U. S. at ___, 106 S.Ct. at 3096. In both statutory schemes, this vigorous enforcement of statutory rights is encouraged through

the awards of attorney's fees. Therefore, the same Congressional policy which led the Court to allow Delaware Valley a fee award for participation in administrative proceedings which grew out of prior litigation also compels such an award here.

CONCLUSION

In view of this Court's recent decision in Delaware Valley and the arguments presented in this brief and the petition for a writ of certiorari, the writ should issue to review the judgment and opinion of the Fifth Circuit. [3]

Respectfully submitted,

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[3] Alternatively, the Court could vacate the judgment and remand this case for reconsideration in light of Delaware Valley.

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